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Q2 ENGINEERING SDN BHD

v.

PJI-LFGC (VIETNAM) LTD & ORS

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HIGH COURT MALAYA, KUALA LUMPUR

LEE SWEE SENG JC

[SUIT NO: D-22NCC-2275-2010]

30 JUNE 2012

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CIVIL PROCEDURE: *Jurisdiction - Forum conveniens - Plaintiff awarded contract for works in Vietnam - Breach of contract - Claim for - Suit filed in Malaysia - Application for stay of proceedings - Whether claim to be adjudicated in Vietnam - Whether works commenced when breach occurred - Whether plaintiff incurred pre-contract expenses -*

D

Whether any one of the conditions under s. 23(1) Courts of Judicature Act 1964 satisfied - Whether Malaysia is the forum which plaintiff's action has real and substantial connection

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CIVIL PROCEDURE: *Stay of proceedings - Forum non conveniens - Plaintiff awarded contract for works in Vietnam - Breach of contract - Claim for - Suit filed in Malaysia - Whether claim to be adjudicated in Vietnam - Whether works commenced when breach occurred - Whether plaintiff incurred pre-contract expenses - Whether any one of the conditions under s. 23(1) Courts of Judicature Act 1964 satisfied -*

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Whether Malaysia is the forum which plaintiff's action has real and substantial connection

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CIVIL PROCEDURE: *Stay of proceedings - Application for - Filing of defence - Whether right of party forfeited when defence filed - Whether party tangibly invited court to adjudicate upon substantive issue*

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The plaintiff and the third defendant ('D3') were private limited companies incorporated in Malaysia whereas the first defendant ('D1') was a private limited company incorporated in Vietnam. The second defendant ('D2'), a company incorporated in France, was the parent company of D1 whereas D3 was a wholly owned subsidiary of D2. Upon securing an agreement in relation to the implementation of gas recovery projects in Hanoi, Vietnam, D1 had awarded a project to the plaintiff *vide* Letter of Award dated 1 June 2009 in relation to works known as, *inter alia*, design, installation, completion and commissioning of landfill gas extraction in Hanoi ('the project'). However, on 18 March 2010, D1's

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representative together with D2 and D3 had a meeting at the plaintiff's office in Petaling Jaya to inform the plaintiff that D2 and D3 would undertake the Project themselves since they considered the plaintiff as a competitor. In light of this, the plaintiff took the stand that the Letter of Award was a concluded contract and as such, D1 was sued for damages for wrongful repudiation of contract consisting of USD334,565.10 as the agreed profit margin under the Letter of Award and a further sum of RM264,330.50 for works done on the Project in respect of the pre-contract engineering expenses. The plaintiff also sued D2 and D3 for inducement which resulted in the breach of contract. The writ had not been served on D2 whose registered office is in Paris. Based on the plaintiff's current suit, D1 and D3 filed an application *vide* encls. 54 and 57 respectively for an order that all further proceedings in this action be stayed under the inherent jurisdiction of the court on the ground that all disputes arising out of or in connection with the Letter of Award should be brought for determination to the Vietnamese court being the *forum conveniens*.

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Held (dismissing encls. 54 and 57 with costs):

- (1) In determining whether an application for stay of the proceedings ought to be granted, the defendant has to show that, (i) Malaysia is not the natural and appropriate forum for trial; and (ii) there is another available and alternative forum which is clearly and distinctly more appropriate than Malaysia. Thus, if all factors were pointing to both jurisdictions are equal, the defendant's application for a stay of proceedings must be dismissed as the defendant had failed to establish a more appropriate forum in which the case may be tried suitably for the interests of all parties and for the ends of justice. (paras 22 & 26)
- (2) It is not necessary to establish jurisdiction by fulfilling all the sub-paragraphs under s. 23(1) of the Courts of Judicature Act 1964 ('CJA'). On the facts, it would appear that the requirement under s. 23(1)(a) CJA had been fulfilled with respect to the plaintiff's cause of action against D1 for breach of contract and against D3 for the tort of inducement for breach of contract having arisen within the jurisdiction of this court. Further, the circumstances surrounding D1's wrongful termination or repudiation of the contract occurred within jurisdiction at the plaintiff's office in

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- A Petaling Jaya and the act of repudiation was prior to the commencement of works for the project. (paras 31, 34 & 39)
- B (2a) This was not a case where one has to travel to Vietnam where the project is to be carried out to determine the breach or assessment of damages. Clearly, the requirement of s. 23(1)(c) CJA had been met with respect to the facts on which the proceedings are based exist of are alleged to have occurred. As such, this court had jurisdiction to hear the matter based on the requirements that had been fulfilled in s. 23(1)(a), (b) and (c) CJA. (paras 39 & 40)
- C (3) The pre-contract engineering works were necessarily carried out within jurisdiction and the mere fact that the project was located in Vietnam or that the construction of the project was to take place in Vietnam was of no consequence and relevance to the plaintiff's claim which was made within jurisdiction. Based on the facts adduced, the connection to the event and transaction was very much within jurisdiction rather than in Vietnam. The proper law in relation to the Letter of Award was the Malaysian law based on the terms of the said letter and the surrounding circumstances. Even if this court should hold that Vietnamese law should apply in relation to the breach of contract and inducement, s. 45 of the Evidence Act 1950 can be applied with respect to an expert opinion as to what is Vietnam law. (paras 43, 45, 48 & 49)
- D (4) On a preliminary point of law, D1 forfeited its right to a stay of proceedings on the basis of *forum non conveniens* as it had proceeded to file its defence and had tangibly invited this court to adjudicate upon the substantive issue. D1 could not be allowed to blow hot and cold or approbate and reprobate by challenging the jurisdiction of this court and at the same time inviting it to adjudicate upon the substantive dispute
- E (*Development & Commercial Bank Berhad v. Aspatra Corporation Sdn Bhd & Anor and Another Appeal*; refd). (paras 12 & 17)
- F (5) Viewed in its proper perspective and proportion, there was nothing that necessitates the transfer of the claims to Vietnam for the project had not yet commenced when the breach and tort were said to have taken place. On the other hand, based on the Letter of Award, there was no need to
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even assess the damages as a consequence of D1's wrongful repudiation of its contract since the plaintiff's agreed profit margin had already been quantified. Thus, Malaysia was the forum which the plaintiff's action has the most real and substantial connection and there was no justifiable reason as to why this claim should be adjudicated in Vietnam. (paras 61 - 63)

Case(s) referred to:

- AK Investment CJSC v. Kyrgyz Mobil Tel Ltd & Ors* [2011] UKPC 7 (**refd**)
- American Express Bank Ltd v. Mohamad Toufic Al-Ozeir & Anor* [1995] 1 CLJ 273 SC (**refd**)
- Amin Rasheed Shipping Corporation v. Kuwait Insurance Co (The Al Wahab)* [1984] AC 50 (**refd**)
- Armar Shipping Co Ltd v. Caisse Algerienne D'Assurance Et De Reassurance* [1981] 1 WLR 207 (**refd**)
- BSNC Leasing Sdn Bhd v. Sabah Shipyard Sdn Bhd & Ors & Another* Appeal [2000] 2 CLJ 197 CA (**refd**)
- Cordoba Shipping Co Ltd v. National State Bank, Elizabeth, New Jersey (The "Albaforth")* [1984] 2 Lloyd's (Rep) 91 (**refd**)
- Development & Commercial Bank Berhad v. Aspatra Corporation Sdn Bhd & Anor* [1996] 1 CLJ 141 FC (**refd**)
- Dubai Electricity Co & Ors v. Islamic Republic of Iran Shipping Lines (The "Iran Vojdan")* [1984] 2 Lloyd's LR 380 (**refd**)
- Enersafe Sdn Bhd v. Megarina Sdn Bhd* [2006] 2 CLJ 1021 CA (**refd**)
- Henry v. Geoprosco International Ltd* [1975] 3 WLR 620 (**refd**)
- John Lavington Bonython And Others v. Commonwealth of Australia* [1951] AC 201 (**refd**)
- Kenichi Hattori & Anor v. Minoru Yamashita & Anor* [2004] 1 CLJ 491 HC (**refd**)
- Malayan Banking Bhd v. The International Tin Council & Anor & Another Case* [1989] 2 CLJ 961; [1989] 1 CLJ (Rep) 87 SC (**refd**)
- Metall und Rohstoff AG v. Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391 (**refd**)
- Oriental Insurance Co Ltd v. Bhavani Stores Pte Ltd* [1998] 1 SLR 253 (**refd**)
- Preston Corp Sdn Bhd v. Edward Leong Nim Fay & Ors* [1982] CLJ 302; [1982] CLJ (Rep) 272 FC (**refd**)
- Re Dulles' Settlement (No. 2)* [1951] Ch 842 (**refd**)
- Re Maria Menado* [1964] 1 LNS 172 HC (**refd**)
- Shearn Delamore & Co & Anor v. Joseph Lee Henn Shen* [1998] 3 CLJ 799 CA (**refd**)
- Spiliada Maritime Corp v. Cansulex Ltd, (The Spiliada)* [1986] AC 460 (**refd**)
- Sykt Bumiputra Kimanis v. Tan Kok Voon* [1988] 2 CLJ 883; [1988] 2 CLJ (Rep) 639 HC (**refd**)

- A *The Abidin Daver* [1984] AC 398 (*refd*)
The Iran Vojdan [1984] 2 Lloyd's (Rep) 380 (*refd*)
Trendex Trading Corporation v. Credit Suisse [1980] 3 All ER 721 (*refd*)

Legislation referred to:

Courts of Judicature Act 1964, s. 23(1)(a), (b), (c)

- B Evidence Act 1950, s. 45

For the plaintiff - Celine Chelladurai (Oommen Kurien with her); M/s Zaid Ibrahim & Co

For the 1st defendant - Wong Hin Loong; M/s Azman Davidson & Co

- C *For the 3rd defendant - Leong Phaik Leng; M/s Sreenevasan Young*

Reported by Kumitha Abd Majid

JUDGMENT

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Lee Swee Seng JC:

Prologue

- E [1] The plaintiff brought this action against the defendants. The action against the 1st defendant (D1) is for damages for breach of contract in a Letter of Award issued by D1 to the plaintiff for a project in Vietnam. The 2nd and 3rd defendants (D2 and D3) have been sued for damages for inducement for breach of the contract in the Letter of Award. The writ has not been served on F the D2 whose registered office is in Paris. D1 and D3 applied for stay of the proceedings in this court on ground of *forum non conveniens*. They contended that the court in Vietnam would be a more appropriate court to hear the disputes of the parties.

- G [2] Considerations of where the cause of action arose for the breach of contract, where the tort of inducement for breach of contract was committed, the applicable law of the contract and the costs of trial and convenience of witnesses would loom large in an application of this nature.

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Parties

- I [3] The plaintiff is private limited company incorporated in Malaysia and its primary business is in the field of landfill gas and biogas extraction and utilisation.

[4] D1 is a private limited company incorporated in Vietnam. D1's business is in biogas capture and waste treatment services for the Nam Son landfill in Hanoi, Vietnam. D2 is Bionersis S.A. and

it is a public limited company incorporated in France and is primarily involved in the renewable energy sector and specialises in landfill biogas valorisation. D3, Bionersis (Malaysia) Sdn Bhd, is a private limited company incorporated in Malaysia and its primary business is in the production of renewable energies and the reduction of greenhouse gasses.

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[5] D2 is the ultimate holding or parent company of D1. D3 is the wholly owned subsidiary of D2. Further the plaintiff asserted that D2 operated its business in the region through D3 and that D2 and/or D3 have management and control of D1. D2 and D3 are the plaintiff's competitors in the industry.

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Problem

[6] D1 had on 7 August 2006 entered into an agreement for Gas Collection Rights with Hanoi Urban Environment Company ("Hanoi URENCO") collaborating in the implementation of the gas recovery projects in Nam Son landfill in Hanoi. The critical and crucial document in this case is a Letter of Award dated 1 June 2009 wherein D1 awarded the plaintiff a project with the scope of works known as 'Design, Installation, Completion and Commissioning of Landfill Gas Extraction and Flaring System for All Cells at Nam Son Landfill, Hanoi, Vietnam' ("the Project").

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[7] The plaintiff later learned from a public announcement and press release that D2 had announced the acquisition of D1. The press release also made reference to the fact that the authorities in Vietnam had approved the project and the commissioning of the first phase of the project was planned in the third quarter of 2010. The plaintiff was anxious about their role in the project and the commencement of the project. It transpired that at a meeting on 18 March 2010 in the plaintiff's office in Petaling Jaya, Dato' Lee Peng Joo representing D1 and Mr Pascal Voisin D2 and/or D3 made known to the plaintiff that D2 and D3 as the controlling shareholder of D1 would undertake the project themselves as they considered the plaintiff a competitor.

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[8] The plaintiffs took the stand that the Letter of Award was a concluded contract and it sued D1 for damages for wrongful repudiation of the contract consisting of USD334,565.10 as the agreed profit margin under the Letter of Award and a further sum of RM264,330.50 for works done on the project in respect of the pre-contract engineering expenses for the period of November 2007 – October 2009. Plaintiff also sued D2 and D3 for inducement for breach of contract.

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- A [9] The Letter of Award states at cl. 1.4 of appendix 1 under “Law and Language” as follows:

The Law of Contract - **Law of Vietnam/Malaysia**

- B The Language for day to day communication-**English**
(emphasis added)

Prayers

- C [10] D1 filed an application in encl. 54 for an order that all further proceedings in this action be stayed under the inherent jurisdiction of the court on the ground that all disputes arising out of or in connection with the Letter of Award dated 1 June 2009 issued by D1 to the plaintiff should be brought for determination to the Vietnamese Court being the *forum conveniens*. D3 also filed a similar application in encl. 57 for a stay of all further proceedings in this action on the same ground including that any alleged procurement or inducement of a breach of contract should be brought for determination to the Vietnamese Court being the *forum conveniens*.
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E **Preliminary Point**

- F [11] The plaintiff through its learned counsel, Miss Celine Chelladurai, raised a preliminary point of law against D1’s application as D1 has proceeded to file its defence. By so doing D1 has taken a step in the proceedings to answer the substantive claim against it. Indeed it has essentially taken an unequivocal voluntary submission of ‘the merits’ *vis-a-vis* D1’s defence to this court.

- G [12] I agree that consequently, D1 has forfeited the right to a stay of proceedings on the basis of *forum non conveniens* as D1 by its action in filing its defence has tangibly and truly invited this court to adjudicate upon the substantive issue.

- H [13] The above proposition is derived from the decision in *Re Maria Menado* [1964] 1 LNS 172, wherein Winslow J held that if a foreign defendant took a step other than its objection to jurisdiction, he would have submitted to the jurisdiction of the court. In holding as such, Winslow J referred at p. 268 to the decision of the English Court of Appeal in *Re Dulles’ Settlement* (No. 2) [1951] Ch 842 where Denning LJ opined:
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I cannot see how anyone can fairly say that a man has voluntarily submitted to the jurisdiction of a court, when he has all the time been vigorously protesting that it has no jurisdiction. If he does

nothing and lets judgment go against him in default of appearance, he clearly does not submit to the jurisdiction. What difference in principle does it make, if he does not merely do nothing, but actually goes to the court and protests that it has no jurisdiction? I can see no distinction at all. *I quite agree, of course, that if he fights the case, not only on the jurisdiction, but also on the merits, he must then be taken to have submitted to the jurisdiction, because he is then inviting the court to decide in his favour on the merits; and he cannot be allowed, at one and the same time, to say that he will accept the decision on the merits if it is favourable to him and will not submit to it if it is unfavourable.* But when he only appears with the sole object of protesting against the jurisdiction, I do not think that he can be said to submit to the jurisdiction. (emphasis added)

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[14] In agreeing with the views expressed by Denning LJ in *Re Dulles' Settlement (No. 2)* (*supra*), Evershed MR similarly opined at p. 847 as follows:

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It is, of course, plain that where a question of jurisdiction arises a man cannot both have his cake and eat it. He cannot fight the issue on the merits, and at the same time preserve the right to say, if the worst comes to the worst, that the court has no jurisdiction to decide against him. And he cannot, consistently with that principle, take any step unequivocally referable to the issue on the merits.

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[15] Further support for the above proposition of law can be found in *Henry v. Geoprosco International Ltd* [1975] 3 WLR 620, where the English Court of Appeal cited with approval the above referred views of Evershed MR in *Re Dulles' Settlement (No. 2)* (*supra*) and added as follows at pp. 639-640:

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We appreciate that on this view the dividing line between what is what is not a voluntary submission and what is and what is not an appearance solely to protest against the jurisdiction is narrow and may often be difficult to draw satisfactorily. *But, as we think, it must depend in each case upon what it was that the defendant did or refrained from doing in relation to the jurisdiction of the foreign court ...*

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For our part, we think that where any issue arise for decision at any stage of the proceedings in the foreign court and that court is invited by the defendant as well as by the plaintiff to decide those issues, "the merits" are voluntarily submitted to that court for decision so that that submission subsequently binds both parties in respect of the dispute as a whole, even if both would not have been so bound in the absence of that voluntary submissions. Were that not so, the submission of a preliminary issue (whether of fact or of law) to a foreign court for decision would not be a voluntary submission to the jurisdiction of that court, and if a defendant lost that issue he could nonetheless

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A thereafter challenge the jurisdiction of that court to try the remaining issues – a proposition which we venture to think cannot be sustained. (emphasis added)

B [16] I agree with learned counsel for the plaintiff that based on the above authorities, it is clear that the filing of the D1's defence precludes D1 from now challenging the jurisdiction of this court to hear the dispute. This is not a case where the plaintiff gave notice to D1 to file its defence by a certain date failing which a judgment in default of defence will be taken against it. If as D1's
C counsel, Mr. Wong Hin Loong, aptly said that he was acting on an abundance of caution in filing the defence, then by the same token he must expressly preserve D1's right to apply for this application by stating that his filing of D1's defence is without prejudice to such an application. Alternatively D1 could have
D asked for a limited stay of the proceedings until the full and formal stay application is heard.

[17] However, no such application was made. I agree with Miss Celine that when D1 proceeded to file its defence it indicated that it wanted to go into the fray, in full swing and that the matter of this court's jurisdiction was a matter of the past; no longer an
E issue. D1 cannot be allowed to blow hot and cold or approbate and reprobate by challenging the jurisdiction of this court and at the same time inviting this court to adjudicate upon the substantive dispute (*Development & Commercial Bank Berhad v. Aspatra Corporation Sdn Bhd & Anor* [1996] 1 CLJ 141).
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[18] Learned counsel for D1 Mr. Wong Hin Loong submitted strongly that the mere fact of having proceeded to file a defence is no complete bar against arguing for a stay. The stay application
G was filed on 8 March 2012 and the defence a day later 9 March 2012. His stand is not without authorities from other jurisdictions and he cited a Bruneian High Court decision in *Sykt Bumiputra Kimanis v. Tan Kok Voon* [1988] 2 CLJ 883; [1988] 2 CLJ (Rep) 639, where Godfrey J held as follows at pp. 640-64:

H The plaintiff, naturally, does not want his action stayed. *His first point is that it is too late now for the defendant to object to the jurisdiction of this court; the defendant has entered an unconditional appearance and indeed has put in a defence. This is all perfectly correct but absolutely irrelevant.* The defendant does not object to the
I jurisdiction of this court. He accepts that the court has jurisdiction to deal with and take cognizance of the plaintiff's claim. *The plaintiff is correct in contending, as he does, that the defendant has submitted to the jurisdiction. Indeed, it is in fact the jurisdiction of this*

court that the defendant invites the court to exercise, that is to say, the court's inherent jurisdiction to stay the action. Whether it would be right at this stage for the court to accept that invitation is another matter altogether, to which I shall come in due course. (emphasis added) A

[19] Mr Wong for D1 also referred to the Singapore Court of Appeal case of *Oriental Insurance Co Ltd v. Bhavani Stores Pte Ltd* [1998] 1 SLR 253. In that case, the respondent was a trading company and shippers based in Singapore who had arranged for the shipment of a consignment. The appellant was an insurance company incorporated in India which had insured the shipment. The respondent sued the appellant under the insurance policies for compensation. The appellant filed a defence and thereafter applied for a stay of proceedings on the basis that the action was more suitably tried in India. The Court of Appeal considered the arguments of both parties and held that the natural forum for the dispute was India. Therefore the appeal was allowed and a stay of proceedings was ordered. B
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[20] My view is that in a case of *forum conveniens* where we are not saying that the present court has no jurisdiction but more that another court is a more natural and convenient a forum to hear the dispute, then a party minded to file a stay of proceedings application on that ground should do so timeously and without taking any further step like the filing of a defence that can be taken to mean that the defendant in question is now voluntarily and willingly inviting the court to assume and exercise jurisdiction in hearing the dispute. E
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[21] Be that as it may I would rather proceed to hear the application for stay of proceedings on its merits rather than dismissing it *in limine*. G

Principles

[22] The test for determining whether a stay application of the proceedings ought to be granted can be culled from a corpus of cases that culminated in the House of Lords case of *Spiliada Maritime Corp v. Cansulex Ltd, (The Spiliada)* [1986] AC 460, 476 and 477. The test is that the defendant has to show that Malaysia is not only not the natural and appropriate forum for the trial but that there is another available and alternative forum which is clearly and distinctly more appropriate than Malaysia. Thus the court would only stay the action “if the defendant satisfies the court that some other forum is more appropriate” – see *The Spiliada (supra)* at p. 478. H
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- A [23] Similarly, in *Trendex Trading Corporation v. Credit Suisse* [1980] 3 All ER 721, Goff J. opined as follows at p. 734:

(2) The court must first consider whether there is another jurisdiction which is **clearly more appropriate** than England for the trial of the action.

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The court looks for another forum which is clearly more appropriate because the court will not lightly stay an action properly commenced (see [1978] 1 All ER 625 at 629, 636, [1978] AC 795 at 810, 818 per Lord Diplock and Lord Salmon), the reason being that, since the jurisdiction of the English court has been competently invoked, a stay should not be granted without good reason (see [1978] 1 All ER 625 at 642, [1978] AC 795 at 826 per Lord Keith). (emphasis added)

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[24] Within our shores, His Lordship Gopal Sri Ram JCA (later FCJ) in *BSNC Leasing Sdn Bhd v. Sabah Shipyard Sdn Bhd & Ors & Another Appeal* [2000] 2 CLJ 197, expressed it this way:

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On the other hand, it may be a case *where there is no clear forum conveniens, in which event a stay will generally be refused*. (European *Asian Bank AG v. Punjab & Sind Bank* [1982] 2 Lloyd's Rep 356).” (emphasis added)

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[25] What is patently plain and crystal clear from the corpus of cases is that the alternative forum must be one that is more appropriate or clearly more appropriate than the court whose jurisdiction has been invoked.

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[26] Thus, if all factors or connections pointing to both jurisdictions are equal, the defendant's application for a stay of proceedings must be dismissed as the defendant has failed to establish a more appropriate forum in which the case may be tried suitably for the interests of all the parties and for the ends of justice.

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[27] The various and varied factors that would weigh on the court's consideration on which is the more appropriate forum as considered in *American Express Bank Ltd v. Mohamad Toufic Al-Ozeir & Anor* [1995] 1 CLJ 273 at p. 281e - 281f are as follows:

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- (a) The law governing the transaction;
- (b) Whether the respective forum had a real and substantial connection with the action;

- (c) The cost of the trial; **A**
- (d) The nature of the dispute, the legal and practical issues involved, local knowledge and the availability of witnesses and their evidence and expenses;
- (e) The place where the transaction giving rise to the litigation occurred and **B**
- (f) Ease of execution.
- [28]** As admitted by learned counsel for D1 Mr. Wong Hin Loong, the evidential burden of showing a more appropriate forum lies upon the defendant/applicant for the stay. The purpose is to identify the forum “with which the action has the most real and substantial connection”. Failure by the defendant at this stage would mean that the stay would be refused. **C**
- [29]** As for D3, its learned counsel Miss Leong Phaik Leng candidly conveyed to this court that the D3’s application for stay in encl. 57 was made following D1’s similar application in encl. 54 filed earlier. It was a move to ensure that if D1’s application is allowed, then naturally the proceedings against D3 which is for inducement for breach of contract would similarly be stayed. Granted that the plaintiff would need to establish that D1 did breach the contract before proceeding to establish that D3 had induced the said breach, she submitted that it makes sense that both causes of action should be heard by one forum and in one set of proceedings. **D**
- [30]** The plaintiff referred the court’s attention to s. 23(1) of the Courts of Judicature Act 1964 which provides as follows: **E**
- 23. Civil jurisdiction - general** **F**
- (1) Subject to the limitations contained in art. 128 of the Constitution the High Court shall have jurisdiction to try all civil proceedings where: **G**
- (a) the cause of action arose; **H**
- (b) the defendant or one of several defendants resides or has his place of business;
- (c) the facts on which the proceedings are based exist or are alleged to have occurred; or **I**

- A (d) any land the ownership of which is disputed is situated, within the local jurisdiction of the court and notwithstanding anything contained in this section in any case where all parties consent in writing within the local jurisdiction of the other High Court.
- B [31] It is trite, that it is not necessary to establish jurisdiction by fulfilling all the sub-paragraphs (*Kenichi Hattori & Anor v. Minoru Yamashita & Anor* [2004] 1 CLJ 491 and *Enersafe Sdn Bhd v. Megarina Sdn Bhd* [2006] 2 CLJ 1021). In this respect learned
- C counsel for the plaintiff submitted that this court has jurisdiction to hear and try the plaintiff's claim herein pursuant to s. 23(1)(a), (b) & (c) of the Courts of Judicature Act 1964.
- [32] With respect to s. 23(1)(a) with respect to where the cause of action is said to have arisen, it was submitted that the plaintiff's
- D cause of action for breach of contract in the sense of repudiating the Letter of Award, which the plaintiff asserted is a binding contract, arose within jurisdiction when on the meeting on 18 March 2010 at the plaintiff's office in Petaling Jaya, D1 through Dato' Lee Peng Joo and D3 through Mr. Pascal Voisin
- E informed the plaintiff that D1 would undertake the project themselves.
- [33] Further with respect to D3's interference with the contract between the plaintiff and D1 as contained in the Letter of Award
- F leading to inducement of its breach, such a tort took place within jurisdiction when D3 through Mr. Pascal Voisin, as controlling shareholder of D1, informed the plaintiff at the said meeting in Petaling Jaya that D2 and/or D3 would undertake the project themselves as they considered the plaintiff to be a competitor in
- G this line of business.
- [34] Thus it would appear that the requirement of s. 23(1)(a) of the Courts of Judicature Act have been fulfilled with respect to the plaintiff's cause of action against D1 for breach of contract and against D3 for the tort of inducement for breach of contract
- H having arisen within jurisdiction of this court.
- [35] With respect to s. 23(1)(b) of the Courts of Judicature Act, it was submitted that D3 is a private limited company under the laws of Malaysia with a registered office at 3rd Floor, No. 17, Jalan Ipoh Kecil, 50350, Kuala Lumpur and a business address at
- I No.9, Jalan Tunku, Bukit Tunku, 50480, Kuala Lumpur. The plaintiff has thus fulfilled the requirement of s. 23(1)(b). It does

not matter if the other defendants like D1 is a Vietnam incorporated company or that D2 is based in Paris. If there is any doubt as to the intention of the legislature in the use of the expression “the defendant or one of several defendants resides or has his place of business”, such a doubt has been dispelled by the Supreme Court in *Malayan Banking Bhd. v. The International Tin Council & Anor & Another Case* [1989] 2 CLJ 961; [1989] 1 CLJ (Rep) 87 wherein Mohd. Azmi SCJ held at pp. 90-91:

Apart from O. 11 r. 1, s. 23(1)(b) of the Courts of Judicature Act 1964 provides extra territorial jurisdiction to the High Court in cases where overseas foreigners are sued as co-defendants with local residents. Our attention has been drawn to the case of *United Malayan Banking Corporation Bhd v. Soo Lean Tooi & Ors* [1984] 1 MLJ 47 where the late Yusuf Abdul Rashid J, had expressed the following opinion on s. 23(1)(b):

In my opinion it is the intention of the legislature to confer jurisdiction in the High Court of Malaysia under s. 23(1)(b) of the Act 91 on a person who does not reside or has no place of business or has no property within the local jurisdiction of the said High Court if such person is one of several defendants who is sued where the other defendants are residing or have a place of business or have property within the local jurisdiction of the said High Court. Section 23(1) of Act 91 would not have been worded so, had the intention of the legislature been different. Should the words ‘one of several defendants’ been omitted, then the High Court would not have jurisdiction on a person who is one of several defendants and who does not reside within the local jurisdiction thereof even if the other defendants are residing therein. Since the provisions of s. 23(1)(b) of Act 91 are in pari materia with the provisions of s. 16(1)(b) of the Singapore Act, the latter provisions should admit the same construction.

In interpreting s. 23(1)(b) of the Courts of Judicature Act, we must in general assume that the legislature knows the then existing state of the law on the jurisdiction of the High Courts under the Courts Ordinance 1948, and in construing an Act of Parliament where the words used by the legislature are precise and unambiguous, then the literal and strict construction rules should apply. *There can be no doubt here that parliament intends to confer on the High Court extra territorial jurisdiction in cases where more than one defendant is being sued, so long as one of the several defendants resides or has his place of business within Malaysia.* (emphasis added)

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- A [36] Further though D1 is a Vietnam-based company, yet Dato' Lee Peng Joo is the "Legal Representative" of D1 with a "permanent residence and current residence" at No. 27, Jalan Keranji 1, Off Jalan Kedondong, Ampang Hilir, 55000, Kuala Lumpur. This is clearly stated in the People's Committee of
- B HochiMinh City's Certificate of Investment 28 March 2011 issued to D1 as exhibited in exhibit DLPJ-1 in D1's affidavit in support of the application for stay. As for Mr. Pascal Voisin, he is the Deputy General Director of D1 with a "permanent residence and current residence" at Unit 9, Jalan Tunku, Bukit Tunku, 50480,
- C Kuala Lumpur as stated in the same exhibit. Mr. Pascal is also the Regional Director, Asia of D2 and a Director of D3 with the same address as stated above. Therefore though the D1 is incorporated in Vietnam, its main protagonists have permanent residences and addresses in Kuala Lumpur and that speaks volume for the
- D convenience of the calling of witnesses for doubtless the two of them will be the *dramatis personae* at the trial for they have been named in the plaintiff's statement of claim with respect to their respective roles in the breach of contract and the inducement for such a breach.
- E [37] Indeed D1 has at all material times a Malaysian address as evidenced in D1's letterheads in exh. LKH 8, LKH 10 and LKH 12 of the plaintiff's affidavit in reply in No. 19, Jalan Astaka U8/83, Bukit Jelutong, 40150 Shah Alam, Selangor (previous
- F Malaysian address) and No. 27, Jalan Keranji 1, Off Jalan Kedondong, Ampang Hilir, 55000 Kuala Lumpur (current Malaysian address) have been represented as an alternative or concurrent business address of the D1. I agree that the letterheads of D1 do not state that its Malaysian addresses are
- G merely "care of" addresses.
- [38] I also take note of the fact that service of process has been effected on D1 within jurisdiction and D1 has entered an unconditional appearance.
- H [39] With respect to s. 23(1)(c) of the Courts of Judicature Act, I agree with Miss Celine for the plaintiff that the circumstances surrounding D1's wrongful termination or repudiation of the contract occurred within jurisdiction at the plaintiff's office in Petaling Jaya. Moreover the act of repudiation of the Letter of
- I Award was prior to the commencement and construction of works for the project. This is not the case where one has to travel to Vietnam where the project is to be carried out to determine the

breach or the assessment of damages. Clearly the requirement of s. 23(1)(c) has been met with respect to “the facts on which the proceedings are based exist or are alleged to have occurred.”

[40] So here is a case where this court clearly has jurisdiction to hear the matter based on the requirements that have been fulfilled in s. 23(1)(a),(b) and (c). The burden then shifts to the D1 and D3 to show that there is a more natural and appropriate forum in Vietnam to hear the dispute. This court shall now proceed to weigh the various considerations that may tilt in favour of a more appropriate forum in Vietnam.

Connection To Event And Transaction

[41] Plaintiff’s counsel submitted that the contract in the Letter of Award was only signed by D1 when the plaintiff received it. The Letter of Award was thus an “offer” which was accepted by the Plaintiff and thus giving rise to an offer that was accepted when the plaintiff accepted the terms and conditions by signing on the acceptance page on 22 June 2009 which acceptance was given within jurisdiction. Therefore a binding contract came into being within jurisdiction. Plain as that proposition is, it receives judicial *imprimatur* in the dicta of His Lordship Salleh Abas FJ in *Preston Corp Sdn Bhd v. Edward Leong Nim Fay & Ors* [1982] CLJ 302; [1982] CLJ (Rep) 272 at p. 276g as follows:

An offer is an intimation of willingness by an offeror to enter into a legally binding contract. Its terms either expressly or impliedly must indicate that it is to become binding on the offeror as soon as it has been accepted by the offeree.

[42] D1 had contended that since the project is to be undertaken in Vietnam then the Vietnamese Court would have the most direction connection to the dispute that has arisen between the parties. However it must be noted that there two components to the plaintiff’s claims. One is for the amount invoiced for pre-contract engineering works done between November 2007-October 2009 which works were done within jurisdiction as follows:

- (a) Assessing the project’s feasibility by means of site investigations, conducting interviews with the local operator, collection of data, and conducting desktop calculations;
- (b) Preliminary design work for submission to the URENCO;

- A (c) Detailed design work and the specification of the type of equipment and instruments to be used;
- (d) Sourcing, identifying, discussing and assessing potential subcontractors and suppliers located in Vietnam, China, Malaysia and Europe for the works to be done and materials to be supplied for the project.
- B
- (e) Attending meetings with the 1st defendant to update the URENCO on the status of the project and to explain the design of the project.
- C
- (f) Conducting detailed calculations on the investment costs and projected Certified Emission Reduction credit returns;
- (g) Organising project reference visits to the plaintiff's project in Malaysia for the officials of the URENCO, at the request of the 1st defendant.
- D

[43] I agree with learned counsel for the plaintiff that clearly the pre-contract engineering works were necessarily carried out within jurisdiction and the mere fact that the project was located in Hanoi, Vietnam or that the construction of the project was to take place in Vietnam is of no consequence and relevance to the plaintiff's claim which was made within jurisdiction. Payment for the plaintiff's services was to be made within jurisdiction ie, HSBC Bank Malaysia Bhd, Account No xxxxxx as stated in exh. LKH 9 of the plaintiff's affidavit in reply. In *Shearn Delamore & Co & Anor v. Joseph Lee Henn Shen* [1998] 3 CLJ 799, the Court of Appeal held that the cause of action for breach of an agency contract arose in Malaya because this was where payment was to be made. His Lordship N H Chan JCA opined as follow at p. 814::

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The circumstances existing here in the present case is this. The appellants are practising lawyers in Kuala Lumpur, West Malaysia and the respondent who practices law in Sabah, East Malaysia had to pay to the appellants in Kuala Lumpur, West Malaysia. It is clear what the cause of action is: the action is brought under s. 171 of the Contracts Act for money had and received whereby the respondent was bound to pay over to the appellants in Kuala Lumpur all sums received on behalf of the appellants. *There was therefore a cause of action for breach of an agency contract which was in Malaya, namely, that the money had not been paid over to the appellants at their office at Kuala Lumpur in Malaya.* (emphasis added)

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[44] As the second component of the plaintiff's claims against D1, it is for repudiation for breach of contract in the Letter of Award which repudiation was communicated by D1 to the plaintiff in the meeting on 18 March 2010 in the plaintiff's office within jurisdiction. In that sense no useful purpose can be served by traversing land and sea to go to Hanoi for the plaintiff to transport its claim there as the repudiation was effected before any construction of the project has commenced in Hanoi.

[45] The connection to the event and transaction is very much within jurisdiction rather than in Vietnam.

Applicable Law Of The Contract

[46] D1 contended through its counsel that the applicable law is Vietnamese law. However appendix 1, cl. 4.1 of the Letter of Award states that 'The Law of the Contract' is '-Law of Vietnam/Malaysia'. It is a clause that is neither here nor there in that it could be this law (Vietnam) or that law (Malaysia). Such a phenomenon is akin to a floating proper law clause which is invalid and unenforceable in law. The aforesaid position was first expressed by the English Court of Appeal in *Armar Shipping Co. Ltd. v Caisse Algerienne D'Assurance Et De Reassurance* [1981] 1 WLR 207 wherein Megaw LJ opined at p. 215:

Counsel for the defendants submits, with what seems to me to be unanswerable legal logic, that there must be a proper law of any contract – a governing law – at the time of the making of that contract.

...

It cannot be that the contract has to be treated as being anarchic: as having no governing law which the court, taking jurisdiction in respect of such a dispute under the contract, would apply in deciding the dispute. There must be a governing law from the outset: not a floating absence of law, continuing to float until the carrier, unilaterally, makes a decision.

[47] Similarly, in *Dubai Electricity Co & Ors v. Islamic Republic of Iran Shipping Lines, (The "Iran Vojdan")* [1984] 2 Lloyd's (Rep) 380 at p. 385 Bingham J opined:

As a matter of English law, it is, I think, clear and not disputed that this clause in the bill of lading is bad insofar as it envisages what may be called a 'floating proper law'

...

- A The proper law is something so fundamental to questions relating to the formation, validity, interpretation and performance of a contract that it must in my judgment, be built into the fabric of the contract from the start and cannot float in an indeterminate way until finally determined at the option of one party.
- B [48] In view of the position rendering appendix 1, cl. 1.4 of the Letter of Award unenforceable and invalid, Miss Celine for the plaintiff submitted that the proper law of the Letter of Award is to be found in the system of law by reference to which the Letter of Award was made or that with which the transaction has its
- C closest and most real connection (*John Lavington Bonython And Others v. Commonwealth of Australia* [1951] AC 201 and *Amin Rasheed Shipping Corporation v. Kuwait Insurance Co* [1984] AC 50). In this regard, the Plaintiff contended that the proper law of the Letter of Award is Malaysian law based on the terms of the
- D Letter of Award and the surrounding circumstances. I agree with that argument.

- [49] Even if this court should hold that Vietnamese law should apply with respect to the plaintiff's claims for breach of contract and inducement for breach of contract, s. 45 of the Evidence Act 1950 can be applied with respect to an expert opinion as to what is Vietnam law.
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Legitimate Personal Or Juridical Advantages

- F [50] The plaintiff expressed some reservations in its submission through its learned counsel if its claims were to be made in the Vietnamese Court as there is no separation of powers under the Vietnamese Constitution. It was argued that Vietnam is a one-party State under the control of the Communist Party of Vietnam
- G and that the judiciary is clearly subject to the Communist Party of Vietnam. The plaintiff also expressed its apprehension with respect to allegations of corruption and abuse of office in the judicial system, governmental inefficiencies and opaque bureaucratic procedures. The plaintiff cited as authority for its resisting the stay
- H application on such grounds by reference to *The Abidin Daver* [1984] AC 398 and *AK Investment CJSC v. Kyrgyz Mobil Tel Ltd & Ors* [2011] UKPC 7. Some of the grounds highlighted in the case that are considered legitimate for a plaintiff to resist a stay
- I would be that there is a risk that justice would not be obtained in the foreign court for ideological or political reasons, or because

of the inexperience or inefficiency of the judiciary or excessive delay in the conduct of the business of the courts or lack of independence of the judiciary or corruption.

[51] The plaintiff also urged upon this court to consider the fact that Vietnam only introduced its Enterprise Law in 2005, owing to the fact that due to the Communist Party of Vietnam's economic and communist policies, company law did not previously exist in Vietnam. The plaintiff expressed grave doubts as to whether the Vietnamese Court would appreciate the inter-relation and intricacies of the plaintiff's claim against D1 and its claims against D2 and D3 for procuring or inducing breach of contract. In support of its fear and foreboding the plaintiff exhibited an article entitled "*Judicial Independence and the Rule of Law: the Vietnam Court Experience*" (2001) 3(1) Asian Law 37 by Penelope Nicholson as exh. LKH 14 in the plaintiff's in reply. The article suggested that the Vietnamese Courts were too expensive, unfair and open to corruption. I would adopt and associate myself with the dicta of Lord Diplock in *Amin Rasheed Shipping Corp v. Kuwait Insurance Co (The Al Wahab)* [1984] AC 50, 67 that Courts will not generally be prepared to adjudicate upon the quality of justice in that other forum. His Lordship observed at p. 67 as follows:

My Lords, it was urged upon this house, as it had been urged upon the courts below, that since Kuwait is one of those countries whose courts adopt the practice and procedure that is followed in countries whose legal systems are derived from the civil law and not from the English common law, the ability of a Kuwaiti court to decide matters of disputed fact is markedly inferior to that of the Commercial Court in England. None of the judges in the courts below accepted this invitation to embark on the invidious task of making a comparison of the relative efficiency of the civil law and common law procedures for the determination of disputed facts. In my opinion, it would have been wholly wrong for an English court, with quite inadequate experience of how it works in practice in a particular country, to condemn as inferior to that of our own country a system of procedure for the trial of issues of fact that has long been adopted by a large number of both developed and developing countries in the modern world. So a natural prejudice in favour of a procedure with which English lawyers are familiar is not a consideration to which any weight ought to be given in determining whether a Kuwaiti court or the Commercial Court in England is the forum conveniens for the present litigation.

- A [52] Such an approach accords with delicate diplomacy and there is no basis to regard a system based on the common law to be superior to that based on civil law, much less to be judgmental of another country's judiciary. At any rate the article was written some 11 years ago and much has changed since then.
- B [53] Whilst it would be improper to berate the quality of justice in another country, there is nothing to stop one from boasting of the efficiency of one's system of administration of justice. As this is a New Commercial Court (NCC) matter, its target date of disposal is within nine months of filing. Trial could not be had within that period as there was a challenge by D1 on the validity of service on its legal representative in Kuala Lumpur. Already this court has fixed 22 - 24 August 2012 for the trial of the matter irrespective of whether by then the writ would be served on D2 out of jurisdiction in Paris. As the plaintiff and D1 had stipulated English to be the language of day to day communication they would certainly be more at home in our court where English is widely used in a more mature legal jurisdiction where there is easy access to both reported cases and legislation online.
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- E [54] The World Bank in its August 2011 Report No. 63263-MY, "Malaysia – Court Backlog and Delay Reduction Program – A Progress Report," extolled the efficiency of the Malaysia Judiciary in disposal of cases and observed at p. 1 as follow:
- F The present study reviews a reform designed and implemented by the Malaysian Judiciary during the period from late 2008 to early 2011. Although conducted over a very short period, this reform has been able to produce results rarely reached even in programs lasting two or three times as long. It thus provides a counter-example to contemporary pessimism about the possibility of the judiciary improving its own performance. Moreover it did so in a country which faces many of the usual contextual obstacles said to have inhibited reform elsewhere ...
- G
- [55] There is no 'legitimate or juridical advantage' that D1 and D3 would be deprived if the trial already fixed were to proceed. See the Singapore Court of Appeal case of *Oriental Insurance Co Ltd v. Bhavani Stores Pte Ltd* [1998] 1 SLR 253.
- H
- The Tort Of Inducement For Breach Of Contract Against D3*
- I [56] D3 through its counsel Miss Leong Phaik Leng submitted that D3's application is contingent upon D1's application in that if D1's application is allowed, it must follow that the plaintiff's

claim must also be adjudicated in Vietnam. D3 also took the stand that it is not open to the plaintiff to have two separate sets of proceedings.

[57] Plaintiff's counsel however was quick to point out the cause of action against D3 is a separate cause of action in tort though related to its cause of action for breach of contract against D1. The plaintiff would of course have to establish a breach of contract first by D1. For that claim D3 is not involved and as such would have no say as to whether D1 has breached the contract. D3 would only be concerned with the plaintiff's claim against it for inducement for breach of contract. As authority in support of the fact that an inducement for breach of contract claim can be made in a separate proceeding, Miss Celine cited the English Court of Appeal case of *Metall und Rohstoff A.G v. Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391. The brief facts as set out in the headnotes are reproduced below. In this case the plaintiff was a Swiss company who traded on the London Metal Exchange through brokers AML. The plaintiff's chief aluminium trader, G, instructed AML to open a number of accounts and with the assistance of certain employees of AML fraudulently traded, exposing the plaintiff to loss. AML, its American parent company ACLI and its American holding company DLJ knew that G was trading fraudulently without the plaintiff's knowledge. The plaintiff began an action against AML and obtained judgment AML for over £50 Million but recovered only £6.7 Million and no costs as AML was by then insolvent. The plaintiff then started proceedings against ACLI and DLJ and obtained an order to serve the writ out of the jurisdiction. The plaintiff were claiming damages for conspiracy but without alleging that the purpose of the conspiracy was to harm the plaintiff for inducing breach of contract, abuse of the process of the court, accounting as constructive trustees and procuring breaches of trust. The defendants took out an application to have the order for service set aside and the learned judge set it aside in respect of claims based on abuse of the process of the court and inducing breach of trust but that otherwise the order should stand. The defendants appealed.

[58] The English Court of Appeal in *Metall und Rohstoff A.G (supra)* held that the only cause of action available to the plaintiff was that founded on inducement or procurement of breaches of contract. Although the acts alleged against the defendants of inducing or procuring a breach of contract had mainly taken place

- A in New York, it was breaches by AML in England that caused the plaintiff substantial damage in England so the tort was committed within jurisdiction. Accordingly, Slade LJ opined as follows at p. 449:
- B If the acts of inducement alleged are viewed in isolation, the torts alleged here in our judgment, would, be properly regarded as, in substance, torts committed in New York. We do not think the acts inducing the compromise agreement breach would displace that conclusion. But if, as we have concluded, the question is where as a matter of substance the torts were committed, the
- C matter must be looked at more broadly, taking account of the breaches (particularly the effective breaches) induced and the resulting damage. On this approach we conclude that as a matter of substance the torts were committed in London. This is the view which the judge took and we agree with him.
- D [59] The above case is also authority for the proposition that the question of where the torts were committed must be looked at more broadly, taking account of the breaches induced and the resulting damage.
- E [60] I would also adopt the principle affirmed by Goff LJ in *Cordoba Shipping Co Ltd v. National State Bank, Elizabeth, New Jersey (The "Albaforth")* [1984] 2 Lloyd's (Rep) 91 at p. 96:
- F If the substance of an alleged tort is committed within a certain jurisdiction, it is not easy to imagine what other facts could displace the conclusion that the courts of that jurisdiction are the natural forum.

Pronouncement

- G [61] I agree with the plaintiff that the only connecting factor to Vietnam is the fact that the project was to be constructed there. However, the plaintiff's claim concerns pre-contract engineering works and the termination of the plaintiff's contract with D1 which occurred prior to the commencement of construction of the
- H project. Viewed in its proper perspective and proportion, there is nothing that necessitates the transfer and transport of the claims to Vietnam for when the breach and tort are said to have taken place, the project has not commenced construction in Vietnam yet.
- I

[62] What is even more pertinent is that based on the Letter of Award, there is no need to even assess the damages as a consequence of the D1's wrongful repudiation of its contract with the plaintiff since the plaintiff's agreed profit margin is already quantified.

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[63] Based on all the above consideration, it is plainly evident that Malaysia is the forum which the plaintiff's action has the most real and substantial connection and there is no justifiable reason why this claim should be adjudicated in Vietnam.

B

[64] Even assuming for a moment that this case has attained to the position where there is no clear *forum conveniens*, a stay generally would be refused once the jurisdiction of the Malaysian Court has been rightly invoked as it has in this case, the plaintiff having met the requirements of s. 23(1)(a),(b) and (c) of the Courts of Judicature Act 1964. I would gladly adopt the words of Bingham J in *Dubai Electricity Co & Ors v. Islamic Republic of Iran Shipping Lines (The "Iran Vojdan")* [1984] 2 Lloyd's LR 380 at p. 387 where there was no clear balance one way or the other:

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There are some factors tending in one direction and some in the other, but I certainly do not conclude, viewing the matters in aggregate, that the defendants show a forum which is clearly more appropriate ... and I can see no great inconvenience or expense or difficulty to them in defending the action here.

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[65] That is to put D1 and D3's case at its highest and even then I am not persuaded that a stay of proceedings should be allowed.

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[66] In the circumstance I had no hesitation in dismissing both D1 and D3's application in encls. 54 and 57 respectively with costs of RM8,000 to be paid by each defendant to the plaintiff.

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